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Federal Communications Commission

DA 99-1849

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 99-278
Table of Allotments,) RM-9424
FM Broadcast Stations.)
(Susquehanna, Pennsylvania and Conklin)
New York))

NOTICE OF PROPOSED RULE MAKING

Adopted: September 9, 1999

Released: September 10, 1999

Comment Date: November 1, 1999

Reply Comment Date: November 16, 1999

By the Chief, Allocations Branch:

1. The Commission has before it a joint petition for rule making filed by Majac of Michigan, Inc. ("Majac"), licensee of Station WKGB-FM, Channel 223A, Susquehanna, Pennsylvania, and Equinox Broadcasting Corporation ("Equinox"), licensee of Station WCDW(FM), Channel 263A, Conklin, New York. Specifically, Majac proposes to reallocate Channel 223A from Susquehanna to Conklin, New York, and modify its Station WKGB-FM license to specify Conklin as its community of license. Equinox proposes the reallocation of Channel 263A from Conklin to Susquehanna, Pennsylvania, and modification of its license to specify Susquehanna as its community of license.¹ Both petitioners state their intention to apply for the respective channels, if reallocated to the specified communities.

2. Each proposal is filed pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station authorization to specify a new community of license without affording other interested parties an opportunity to file a competing expression of interest. The proposed reallocation must result in a preferential arrangement of allotments as required by

¹Petitioners submit declarations agreeing to the license modifications, advising Majac has agreed to compensate Equinox for its participation in this proceeding and for accepting a modification of license. Petitioners also assert that there is no restriction in the Commission's Rules precluding such compensation where the compensation is not being paid for withdrawal of any rule making petition, proposal, or application. Majac is hereby requested to provide a copy of said agreement with its comments.

Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990). In this joint proposal, each community's Class A FM allotment will be exchanged. Equinox proposes a Station WCDW(FM) transmitter site at Susquehanna that will comply with all Commission technical requirements.² On the other hand, Majac proposes to relocate Station WKGB-FM's transmitter site.³ While maintaining maximum Class A FM facilities, the petitioners claim that Station WKGB-FM will provide service to an additional 58,691 persons. The transmitter site relocation will result in 16,445 persons losing service. However, the petitioners argue that this population will continue to receive service from at least five other radio stations.

3. In a related vein, Conklin lies partially within the Binghamton Urbanized Area. Station WKGB-FM currently provides a 70 dBu service to 11.5% of the Urbanized Area. At the proposed reference site, Station WKGB-FM will provide a 70 dBu service to 69.1% of the Urbanized Area. Although we generally apply the Huntington Doctrine and require a Tuck⁴ showing when a station seeks to reallocate a channel from a community located outside of an urbanized area to a community located partially or entirely within an urbanized area, we do not believe that Huntington or Tuck should apply in this case because there is no first local service preference at issue here and because no community will lose or be denied FM service. Rather, the petitioners essentially propose to exchange communities of license; as a result, both communities will retain first local aural services. However, since Station WKGB-FM seeks to change its transmitter site, Majac has provided the required gain and loss area study. Likewise, Equinox is requested to provide a gain and loss area study for the alternate fully-spaced site proposed for the reallocation of Channel 263A to Susquehanna, Pennsylvania.

4. We believe that this joint proposal warrants consideration because it will enable Station WKGB-FM to expand its service area while maintaining local service at both Susquehanna and Conklin. Since Susquehanna and Conklin are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been requested. As requested, we shall also propose to modify Station WKGB-FM's license to specify operation on Channel 223A at Conklin, New York, and Station WCDW(FM)'s license to specify operation on Channel 263A at Susquehanna, Pennsylvania, as their new communities of license.

²The reference coordinates for Channel 263A at Susquehanna are 42-02-30 North Latitude and 75-41-30 West Longitude. However, Equinox currently intends to continue operating Station WCDW(FM) at its existing transmitter site pursuant to Section 73.215 of the Commission's Rules.

³The reference coordinates for Channel 223A at Conklin are 42-06-53 North Latitude and 75-51-16 West Longitude.

⁴See Huntington Broadcasting Co. v. FCC, 192 F.2d 33 (D.C. Cir. 1951) and Faye and Richard Tuck, 3 FCC Rcd 5374 (1988). Tuck sets forth various factors for determining whether a first local service preference is warranted to a suburban community of an urbanized area.

In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest in the use of Channel 223A at Conklin, New York, or Channel 263A at Susquehanna, Pennsylvania.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Susquehanna, Pennsylvania	223A	263A
Conklin, New York	263A	223A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before November 1, 1999, and reply comments on or before November 16, 1999, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultants, as follows:

Peter Tannenwald, Esq.
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(Counsel for Majac of Michigan, Inc.)

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(Counsel or Equinox Broadcasting Corporation)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments: Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be

accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., TW-A325, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street, N.W., Washington, D.C.